BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MINDY RAKESTRAW	)	
Claimant	)	
	)	
VS.	)	Docket Nos. 1,025,650 &
	)	1,025,651
SUPERIOR INDUSTRIES, INC.	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 25, 2007, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on August 7, 2007. William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Troy A. Unruh, of Pittsburg, Kansas, appeared for the self-insured respondent.

In Docket No. 1,025,650, with a date of accident of May 20, 2005, the Administrative Law Judge (ALJ) found that the rating opinions of both Drs. Edward Prostic and Kevin Komes were equally credible and found claimant's permanent impairment to her right upper extremity to be the mean of their opinions, or 6 percent.

In Docket No. 1,025,651, with an alleged date of accident of either July 27, 2005, or July 29, 2005, the ALJ found that claimant failed to prove by a preponderance of the evidence that she reported the alleged work injury to her back within 10 days as required by K.S.A. 44-520, or that the injury arose out of and in the course of her employment. For both reasons, the ALJ denied claimant workers compensation benefits for her alleged back injury.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

These two cases were consolidated for trial and award by the ALJ. Neither party is contesting the ALJ's award in Docket No. 1,025,650, the case involving her right upper

extremity. In Docket No. 1,025,651, the case involving her back, claimant contends the ALJ erred in determining she did not give timely notice of accident and that she failed to prove she met with injury by accident that arose out of and in the course of her employment. Claimant argues that she spoke with her supervisor twice, telling him she was injured and would need to fill out paperwork. Claimant further argues that it was apparent that she sustained an injury on or about July 29, 2005, while doing her job at respondent. Claimant requests the Board find that she has a 7 percent permanent partial impairment to the body as a whole as a result of her work injury on or about July 29, 2005. Claimant further requests the Board find she had a one-month work disability of 67.5 percent when claimant was unemployed, a work disability of 50.5 percent during her employment at Pitt Plastics, and a current work disability of 33 percent, plus an award for the payment of her medical expenses.

Respondent argues that claimant did not carry her burden of proving that her back injury arose out of and in the course of her employment. In the event claimant did suffer a work-related injury, respondent argues that she did not give respondent notice of the injury within 10 days. It is respondent's position that the September 30, 2005, letter from claimant's attorney was its first notice of the alleged accident and its first notice that claimant was alleging her back injury to be work related. Respondent contends claimant's testimony is not credible and the Board should find that there was no work injury and no timely notice. If it is determined that claimant suffered a compensable work-related injury that resulted in an impairment, respondent asserts that she has no restrictions and, thus, no task loss. Respondent notes that claimant's current average weekly wage is $810.36; therefore, her wage loss is 19 percent. Respondent also argues that if claimant's back claim is found to be compensable, it is due a credit for overpayment of temporary total disability benefits.

The issues before the Board are:

(1) Was claimant injured on or about July 27, 2005, or July 29, 2005, and if so, did that injury arise out of and in the course of her employment with respondent?

(2) If claimant suffered a work-related injury on or about July 27, 2005, or July 29, 2005, did she give respondent timely notice of that injury?

(3) If claimant suffered a work-related injury on or about July 27, 2005, or July 29, 2005, what is the nature and extent of her injury and permanent impairment of function?

(4) If claimant suffered a work-related injury on or about July 27, 2005, or July 29, 2005, is she entitled to a work disability? If so, what was her task loss and her wage loss?

(5) If claimant suffered a work-related injury on or about July 27, 2005, or July 29, 2005, is respondent entitled to a credit for overpayment of temporary total disability benefits?

FINDINGS OF FACT

Claimant had been employed at respondent, a wheel manufacturer, for 15 years, and at the time of her injuries she was a foreman. She was terminated on September 27, 2005, for willfully falsifying company records. The return-to-work slip she gave to respondent after she was released from treatment had originally indicated she could return to work on September 21, 2005. However, that slip had been altered to appear that her return date was September 27 instead of September 21. Respondent determined claimant made the alteration, and she was terminated for this transgression. Claimant denies she altered the return-to-work slip.

On May 20, 2005, claimant pulled a wheel off the line and injured her right elbow. She reported the injury to her supervisor, who filled out an accident report. She was then sent by respondent to Occupational Health. She was eventually treated by Dr. Paul Toma, who performed surgery on her right elbow on September 8, 2005. The ALJ awarded claimant a 6 percent permanent partial impairment to her right upper extremity for this injury, and, as stated, neither party is contesting that award.

There is some confusion about the date of claimant's alleged back injury. But from the records of Dr. Richard Gellender and records kept at respondent, it appears that claimant's claimed date of injury was July 27, 2005, rather than July 29, 2005, because claimant was seen by Dr. Gellender for back pain on July 28, 2005. Claimant alleges she and a coworker were pushing a trolley that contained pallets of wheels when she injured her back. She said that one of the bumper stops got stuck, and the trolley needed to be pushed to get it unstuck. Claimant felt an immediate ache in her back when pushing the trolley. She did not mention anything to her coworker but said she did talk to an inspector, Sherree Hill. Ms. Hill testified, however, that she did not recall having a conversation with claimant about her injuring her back at work.

Claimant contends she then talked to John Tersinar, respondent's manufacturing manager, and told him she had injured her back and was leaving early because her back hurt. She claims that her immediate supervisor, Ronald D. Crockett, was present when she and Mr. Tersinar had this conversation. She left the plant about 2:30 p.m. Claimant could hardly get out of bed the next morning. She testified that she called Mr. Tersinar the day after the injury and told him she could not come in to work and that she was going to try to see a doctor. Mr. Tersinar told her that they would take care of the paperwork later. She assumed the paperwork Mr. Tersinar was talking about was an accident report. However, when claimant went to the human resources department to fill out the paperwork

promised by Mr. Tersinar, instead of an accident report she found the paperwork for FMLA leave. Claimant stated that she knew if an accident report had not been filled out, it meant that respondent did not want a workers compensation issue raised. She completed the FMLA paperwork and said she did not push the workers compensation issue out of fear she would lose her job. Claimant was paid her full salary while off on FMLA leave.

Norma Foley, a human resource specialist at respondent, testified that claimant came to her and requested the FMLA paperwork. Claimant was on FMLA leave for a back injury through September 19, 2005. Ms. Foley said that claimant never told her how she had hurt her back, and Mrs. Foley never asked.

Mr. Tersinar testified that he does not recall any conversation with claimant in July 2005 informing him that she had been injured while working and was leaving to go home. He does not remember claimant calling him after her injury and telling him she could not come in to work because her back hurt. He does not recall any conversation where claimant reported a work injury and him telling her he would get the paperwork started. Mr. Tersinar knew claimant had back trouble but thought it was a personal injury. He admitted that claimant mentioned her back complaints once or twice before she physically left the plant the last time in July 2005. However, she only mentioned that she had a sore back. One time, she mentioned that she had done something over the weekend and her back was sore and she had seen a doctor. Mr. Tersinar admitted that if a supervisor knows of an employee's nonwork-related injury, that supervisor is supposed to fill out paperwork if the employee has seen a doctor. He did not fill out any of that paperwork on claimant.

Mr. Crockett, respondent's leak test and pack general supervisor and claimant's immediate supervisor, likewise does not recall a conversation between claimant and Mr. Tersinar wherein claimant said she was leaving early because she had hurt her back. Mr. Crockett was working third shift the week ending July 31 and would only be at the plant until about 9:00 or 9:15 a.m. He cannot remember having a face-to-face conversation with claimant that week , but he did receive a telephone call from her one morning wherein she said she would not be in to work because her back was hurting. Claimant did not say she had hurt her back at work in that telephone conversation. And he did not ask her about the cause of her back pain. He does not recall claimant reporting a claim for a work-related back injury to him. If she had, he would have notified the safety department.

Tim Rakestraw is safety director at respondent. Part of his duties is the administration of workers compensation claims. Claimant turned in an incident report concerning her elbow injury. He arranged for medical treatment for claimant's elbow. However, neither claimant nor anyone on her behalf turned in an accident report concerning an injury to her back at work. The first he knew that she was claiming a back injury was when respondent received the paperwork that she was making a workers compensation claim. After the claim was filed, Mr. Rakestraw spoke with Mr. Tersinar and Mr. Crockett and asked them whether claimant reported a back injury. Both indicated that

they had not been told about a work-related injury. As a foreman, claimant had the responsibility of reporting work-related accidents involving her subordinates. She had access to the accident report forms. She would not have had to go to Mr. Rakestraw, Mr. Crockett or Mr. Tersinar for one.

Mr. Rakestraw spoke with claimant during the period she was on FMLA leave. She never talked to him about her back during those conversations.

Claimant was treated by her personal physician, Dr. Richard Gellender, on July 28, 2005. She told him that her low back was hurting with the onset being the previous day. He had no information on how claimant injured her back. After seeing her four times, he referred her to Dr. Brian Ipsen, an orthopedic spine surgeon.

Dr. Ipsen first saw claimant on September 13, 2005. She complained of back and left leg pain. Claimant gave a history of three months of progressively severe back and leg pain. She said she had been lifting something at work in July 2005. She told him she had previous lumbar spine surgery in 2003. Dr. Ipsen sent her for an MRI scan to confirm a diagnosis. He also gave her a return-to-work slip that said she could return to work on September 19 with restrictions of no repetitive bending, lifting or twisting.

Claimant returned to Dr. Ibsen's office on September 20 after having the MRI. After reviewing the results of the MRI, Dr. Ipsen thought claimant had degenerative disk disease at L5-S1 with a degenerative disk bulge and recommended conservative treatment. Dr. Ibsen opined that since claimant reported being fine after her last surgery and based on her history, trauma at work was a causative factor in her physical condition.

On September 20, 2005, Dr. Ibsen gave claimant a return-to-work slip that indicated she could return to work on September 21 with no restrictions. The slip is in his handwriting. He normally prepares the slips in his office while the patient is in the examining room. He handed the slip to claimant as she was leaving. He does not specifically remember discussing the return-to-work slip with claimant.

Claimant returned to respondent on September 23, 2005, and turned the return-to-work slip in to Ms. Foley. Later she was called by Leo Sievert, respondent's human resources manager. He told her there was some discrepancy about the note and said it appeared the slip had been altered. Claimant denied altering it. She said that no one at Dr. Ipsen's office told her she would be returning to work on September 21; they just told her she was released. She said that when she received the return-to-work slip, she folded it up and stuck it in her back pocket. She did not see the doctor write the slip and said she picked it up from someone at the front desk. She did not look at the note at the doctor's office. When she got to her home, which she shares with her nine-year-old son, she put the note on the table between her couches.

Ms. Foley identified the return-to-work slip claimant brought in to her. When claimant came in, Ms. Foley asked her when she was being released, and claimant said she would be released on Tuesday. When Ms. Foley looked at the slip, she noticed the blue ink mark on the "27." The horizontal part of the seven was in blue ink and the rest of the note was in black ink. She went to the office of Tim Rakestraw and showed him the doctor's note. She did not tell him the note had been altered but only asked if he noticed something different on the note. Mr. Rakestraw looked at the note and asked her if she was talking about the blue mark on top. Mr. Rakestraw then called Dr. Ibsen's office and requested they fax him a copy of the note. They received a fax copy of the note and took both notes to Leo Sievert. The faxed copy showed claimant was to return to work on September 21.

Mr. Rakestraw saw claimant the day she turned in her return-to-work slip. They crossed paths in a hallway and she told him she would be returning to work on the 27th. About 15 minutes later, he was shown the return-to-work slip by Ms. Foley. Ms. Foley questioned the return date of September 27, 2005, because the seven looked like it was a one with a mark on it making it look like a seven. The mark was in blue ink and the rest was in black ink. He called the doctor's office and asked when claimant was to return to work and was told it was the 21st. He then asked the doctor's office to fax him a copy of the return-to-work slip. He noted the faxed copy showed a return date of 9-21-05 and the form from claimant showed a return date of 9-27-05. At that point, Ms. Foley took the slips to Mr. Sievert.

Leo Sievert is the human resources manager for respondent. He testified that in September 2005, claimant was employed but on FMLA leave. In September 2005, Ms. Foley brought him a doctor's certification that had been received from claimant that appeared to be altered. Ms. Foley showed him the doctor's certification and said that it appeared a date had been changed. Mr. Sievert called claimant that same day and asked her to come in to discuss the return-to-work certification. When she came in, Mr. Sievert showed her the two copies of the return-to-work slip. Claimant said that someone at the front desk of the doctor's office handed her the note and she folded it up and stuck it in her pocket. She said she normally carries her checkbook and an ink pen in her pocket and that is how it could have been marked. Claimant was put on suspension pending review.

Mr. Sievert followed up with Mr. Rakestraw to verify what the doctor's office had told him when he asked for the fax. Mr. Sievert then called the doctor's office to gain additional information. The doctor's office told him that claimant was given a note and was informed that she could return to work on the 21st. He did not get the name of the person he talked to at the doctor's office. He does not know if he talked to the person who gave claimant the note or whether the doctor gave claimant the note. He did not make a record of the conversation with the doctor's office in claimant's personnel file. During the telephone conversation, Mr. Sievert asked whether claimant was told what date she was released to return to work, and the doctor's office response was yes, claimant had been told. After this

telephone conversation, Mr. Sievert recommended to corporate that claimant be terminated. He was given permission to terminate her three or four days later. Claimant was terminated for violation of Work Rule No. 25, willfully falsifying company records, including employment records. Respondent assessed 100 points to claimant for that transgression, and 100 points are needed for termination. Mr. Sievert agreed that if this was an intentional act by claimant, it was pretty open and conspicuous, as it was an apparent alteration. Claimant had not run afoul of any policies of respondent before this alleged incident because of truthfulness. At the time of claimant's termination, Mr. Sievert was unaware that she had a work-related injury.

PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2006 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

In *Box*,[1] the Kansas Supreme Court said the burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date

[1] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

> of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

ANALYSIS

Claimant alleges she suffered a back injury at work, yet she did not request respondent send her to a doctor. Instead, claimant went to her personal physician, Dr. Gellender, on July 28, 2005. Claimant was a foreman with respondent and, in addition, had a prior workers compensation claim for which respondent was providing treatment. So she was aware of the respondent's right to direct medical care and its obligation to provide medical treatment to injured workers under workers compensation. Claimant was also aware of the respondent's requirement to not only report accidents but, in addition, to complete an accident report. She did not do that. And she did not tell Dr. Gellender that her back injury was work related. Claimant's explanation for not completing an accident report, that it was because of fear of losing her job, does not make sense as she had previously made a workers compensation claim and was not fired for doing so. Instead, she completed an application for FMLA leave, which paid her more than what she would have received under workers compensation for temporary total disability. There are no witnesses that corroborate claimant's testimony that she gave notice in person on the date of accident and by phone the following day.

CONCLUSION

Claimant has failed to prove she gave respondent timely notice of her July 27, 2005, accident. Therefore, benefits must be denied in Docket No. 1,025,651.

The Board notes that the ALJ indicated that a reasonable attorney fee shall be awarded upon presentation of claimant's written contract of employment. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in Docket No. 1,025,650, he must submit his contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated April 25, 2007, is affirmed as to both docketed claims.

IT IS SO ORDERED.

Dated this _____ day of August, 2007.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Troy A. Unruh, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge